Supreme Court, U.S.
FILED
991088 DEC 28 1999
OFFICE OF THE CLERK

No. 99-

IN THE

Supreme Court of the United States

BRYAN R.,

Petitioner,

v.

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. WAXMAN
Attorney for Petitioner
371 Fore Street
Suite 303
Portland, ME 04101
(207) 772-9558

155759

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

53pp

QUESTION PRESENTED

Does the First Amendment preclude a civil court from holding a religious organization liable for its negligent or reckless or intentional failure to stop a known, adult, child molester member of the church from sexually abusing another child member of the religion?[1]

---

1. At present, there is a split among state courts as well as among federal circuits — and generally, great confusion — as to whether the First Amendment has any kind of preclusive impact on claims alleging tortious activity on the part of religious organizations that allowed, enabled or encouraged sexual molestation of children to take place. *See e.g., courts holding generally that the First Amendment does not bar tort liability — Martinelli v. Bridgeport Catholic Diocesan Corp.*, 10 F. Supp. 138 (D. Conn. 1998), *aff'd in part, vacated in part by Martinelli v. Bridgeport Catholic Diocesan Corp.*, __ F.3d __, 1999 WL 1041457 (2nd Cir. 1999); *Smith v. O'Connell*, 986 F. Supp. 73 (D.R.I. 1997); *Barquin v. Roman Catholic Diocese of Burlington, Vt.*, 839 F. Supp. 275 (D. Vt. 1993); *Parks v. Kownacki*, 711 N.E.2d 1208 (Ill. App. 1999); *CJC v. Corporation of Catholic Bishop of Yakima*, 985 P.2d 262 (Wash. 1999); *Doe v. Hartford Roman Catholic Diocesan Corp.*, 716 A.2d 960 (Conn Super. 1998); *Smith v. Privette*, 495 S.E.2d 395 (N.C. App. 1998), *appeal dismissed by Smith v. Privette*, 501 S.E.2d 913; *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 716 A.2d 967 (Conn. Super. 1998); *Heroux v. Carpentier*, 1998 WL 388298 (R.I. Super. 1998); *Corsie v. Campanalonga*, 721 A.2d 733 (N.J. Super. App. 1998), *appeal granted in part, decision reversed in part by Corsie v. Campanalonga*, 734 A.2d 788 (N.J. 1999); *F.G. v. MacDonell*, 696 A.2d 697 (N.J. 1997); *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 654 N.Y.S.2d 791 (N.Y. App. 1997), *cert. denied Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 522 U.S. 967; *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997); *Konkle v. Henderson*, 672 N.E.2d 450 (Ind. App. 1996); *Doe v. Dorsey*, 683 So.2d 614 (Fla. Dist. App. 1996); *Bear Valley Church of Christ v.*

(Cont'd)

(Cont'd)

DeBose, 928 P.2d 1315 (Colo. 1996), *cert. denied by Wolfe v. DeBose*, 520 U.S. 1241 and *cert. denied by Bear Valley Church of Christ v. DeBose*, 520 U.S. 1248 (1997); *Lundman v. McKown*, 530 N.W.2d 807 (Minn. App. 1995), *cert. denied, Lundman v. First Church of Christ Scientist*, 516 U.S. 1092 (1996) and *cert. denied McKown v. Lundman*, 516 U.S. 1099 (1996); *HRB v. JLG*, 913 S.W.2d 92 (Mo. App. 1995); *Hutchison v. Luddy*, 606 A.2d 905 (Pa. Super. 1998); *Mrozka v. Archdiocese of St. Paul and Minneapolis*, 482 N.W.2d 806 (Minn. App. 1992); *State v. Motherwell*, 788 P.2d 1066 (Wash. 1990); *Erickson v. Christenson*, 781 P.2d 383 (Or. App. 1989); *courts holding generally that the First Amendment does bar tort liability — Ayon v. Gourley*, 47 F. Supp. 2d 1246 (D. Colo. 1998), *aff'd, Ayon v. Gourley*, 185 F.3d 873 (10th Cir. 1999); *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991); *N.H. v. Presbyterian Church*, __ P.2d __, 1999 OK 88 (Okla 1999); *Bryan R. v. Watchtower Bible and Tract Society*, 738 A.2d 839 (Me. 1999); *Langford v. Roman Catholic Diocese of Brooklyn*, 677 N.Y.S.2d 436 (N.Y. Sup. 1998); *Doe v. Evans*, 718 So.2d 286 (Fla. Dist. App. 1998); *LLN v. Clauder*, 563 N.W.2d 434 (Wis. 1997); *Swanson v. Roman Catholic Church*, 692 A.2d 441 (Me. 1997).

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	ix
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provision Involved	1
Statement of the Case	1
Argument	2
Reasons for Granting the Writ	2
I. The Establishment Clause does not bar Bryan Rees' claims	2
II. The Free Exercise Clause does not bar Bryan Rees' claims	8
Conclusion	18

TABLE OF CITED AUTHORITIES

Page

Cases:

Agostini v. Felton, 521 U.S. 203 (1997) 3, 4, 7

Ayon v. Gourley, 47 F. Supp. 2d 1246 (D. Colo. 1998), *aff'd*, *Ayon v. Gourley*, 185 F.3d 873 (10th Cir. 1999) ii

Barquin v. Roman Catholic Diocese of Burlington, Vt., 839 F. Supp. 275 (D. Vt. 1993) i

Bear Valley Church of Christ v. DeBose, 928 P.2d 1315 (Colo. 1996), *cert. denied by Wolfe v. DeBose*, 520 U.S. 1241 and *cert. denied by Bear Valley Church of Christ v. DeBose*, 520 U.S. 1248 (1997) ..... i, ii

Bob Jones University v. U.S., 461 U.S. 574 (1983) 12

Bryan R. v. Watchtower Bible and Tract Society, 738 A.2d 839 (Me. 1999) ..... ii, 1, 4

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 14

CJC v. Corporation of Catholic Bishop of Yakima, 985 P.2d 262 (Wash. 1999) i

Cited Authorities

	Page
Corsie v. Campanalonga, 721 A.2d 733 (N.J. Super. App. 1998), *appeal granted in part, decision reversed in part by Corsie v. Campanalonga*, 734 A.2d 788 (N.J. 1999)	i
Davis v. Beason, 133 U.S. 333 (1890)	12
Doe v. Dorsey, 683 So.2d 614 (Fla. Dist. App. 1996)	i
Doe v. Evans, 718 So.2d 286 (Fla. Dist. App. 1998)	ii
Doe v. Hartford Roman Catholic Diocesan Corp., 716 A.2d 960 (Conn Super. 1998)	i
Elizabeth Peck v. Lansing School District, 148 F.3d 619 (6th Cir. 1998)	3, 4
Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990)	13
Erickson v. Christenson, 781 P.2d 383 (Or. App. 1989)	ii
F.G. v. MacDonell, 696 A.2d 697 (N.J. 1997)	i
Gibson v. Brewer, 952 S.W.2d 239 (Mo. 1997)	i
Heroux v. Carpentier, 1998 WL 388298 (R.I. Super. 1998)	i

Cited Authorities

	Page
Hill v. Gill, 703 F. Supp. 1034 (D.R.I. 1989)	10
HRB v. JLG, 913 S.W.2d 92 (Mo. App. 1995)	ii
Hutchison v. Luddy, 606 A.2d 905 (Pa. Super. 1998)	ii
Jehovah's Witnesses v. King County Hospital, 390 U.S. 598 (1968)	10
Jimmy Swaggart Ministries v. Board of Equalization of Cal., 493 U.S. 378 (1990)	3
Kenneth R. v. Roman Catholic Diocese of Brooklyn, 229 A.D. 2d 159, 654 N.Y.S. 2d 791 (N.Y. App. 1997), *cert. denied by Roman Catholic Diocese of Brooklyn v. Kenneth R.*, 522 U.S. 967 (1997)	i, 3
Konkle v. Henderson, 672 N.E.2d 450 (Ind. App. 1996)	i
Langford v. Roman Catholic Diocese of Brooklyn, 677 N.Y.S.2d 436 (N.Y. Sup. 1998)	ii
LLN v. Clauder, 563 N.W.2d 434 (Wis. 1997)	ii
Lundman v. McKown, 530 N.W.2d 807 (Minn. App. 1995), *cert. denied, Lundman v. First Church of Christ Scientist*, 516 U.S. 1092 (1996) and *cert. denied McKown v. Lundman*, 516 U.S. 1099 (1996)	ii

Cited Authorities

Page

Martinelli v. Bridgeport Catholic Diocesan Corp., 10 F. Supp. 138 (D. Conn. 1998), *aff'd in part, vacated in part by Martinelli v. Bridgeport Catholic Diocesan Corp.*, __ F.3d __, 1999 WL 1041457 (2nd Cir. 1999) i

Mrozka v. Archdiocese of St. Paul and Minneapolis, 482 N.W.2d 806 (Minn. App. 1992) i

N.H. v. Presbyterian Church, __ P.2d __, 1999 OK 88 (Okla 1999) ii

Nutt v. Norwich Roman Catholic Diocese, 921 F. Supp. 66 (D. Conn. 1995) 2, 6, 7

Parks v. Kownacki, 711 N.E.2d 1208 (Ill. App. 1999) i

Prince v. Massachusetts, 321 U.S. 168 (1944) 10, 12

Reynolds v. U.S., 98 U.S. 145 (U.S 1878) 12

Rosado v. Bridgeport Roman Catholic Diocesan Corp., 716 A.2d 967 (Conn. Super. 1998) ... i, 5, 6, 7

Schmidt v. Bishop, 779 F. Supp. 321 (S.D.N.Y. 1991) ii

Smith v. O'Connell, 986 F. Supp. 73 (D.R.I. 1997) ..... i, 5

Cited Authorities

	Page
Smith v. Privette, 495 S.E.2d 395 (N.C. App. 1998), *appeal dismissed by Smith v. Privette*, 501 S.E.2d 913 (1998)	i
State v. Motherwell, 788 P.2d 1066 (Wash. 1990)	ii
Surinach v. Pesquera De Busquets, 604 F.2d 73 (1st Cir. 1979)	9
Swanson v. Roman Catholic Church, 692 A.2d 441 (Me. 1997)	ii
United States v. Lee, 455 U.S. 252 (1982)	12
Statute:	
28 U.S.C. § 1257	1
United States Constitution:	
First Amendment	i, 1
Other Authority:	
Mill, John Stuart, *On Liberty*	18

TABLEOF APPENDICES

Page

Appendix A — Opinion Of The Maine Supreme Judicial Court Dated And Decided October 18, 1999 ..... 1a

Appendix B — Decision And Order Of The Superior Court, State Of Maine, Cumberland County On Defendants' Motion To Dismiss Dated August 18, 1998 And Filed August 19, 1998 ... 18a

Petitioner, Bryan Rees, respectfully requests that a writ of certiorari be issued to review the judgment of the Maine Supreme Judicial Court.

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court is reported at *Bryan R. v. Watchtower Bible and Tract Society of New York, Inc. et al,* 1999 ME 144, 738 A.2d 839 (Me. 1999). The decision and order of the Superior Court, Cumberland County, is unpublished. (App. B).

STATEMENT OF JURISDICTION

The judgment of the Maine Supreme Judicial Court was entered on October 18, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment of the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

STATEMENT OF THE CASE

The fundamental question is whether a religious organization may invoke the First Amendment as a shield from civil liability for its negligent or reckless or intentional failure to take reasonable steps to prevent an adult pedophile member of the church from molesting additional children of

the church. The Defendant church knew that Mr. Baker had previously molested a child in the church. Yet the Defendant church did not take any reasonable steps to prevent Mr. Baker from molesting other children in the church. As a direct result of that failure, the Plaintiff Bryan Rees was repeatedly sexually abused over several years.

ARGUMENT

> The First Amendment to the United States Constitution forbids any law respecting the establishment of religion, or prohibiting the free exercise thereof . . . The Free Exercise Clause prohibits excessive state entanglement with religion . . . Although no Supreme Court decision has determined the applicability of the First Amendment as a defense for a religious organization's negligent conduct, the Court has held that the First Amendment does not create blanket tort immunity for religious institutions or their clergy, thus allowing clergy and clerical institutions to be sued for torts they commit.

Nutt v. Norwich Roman Catholic Diocese, 921 F. Supp. 66, 73 (D. Conn. 1995).

REASONS FOR GRANTING THE WRIT

I. THE ESTABLISHMENT CLAUSE DOES NOT BAR BRYAN REES' CLAIMS

The Church and the trial court and the Maine Supreme Judicial Court incorrectly *presumed* that applying neutral tort principles to the Church would involve excessive

governmental entanglement. The Supreme Court of the United States, in a recent decision, has markedly changed the landscape of Establishment Clause jurisprudence, admonishing, *inter alia*, that *presumptions* of excessive entanglement are no longer appropriate. *See Agostini v. Felton*, 521 U.S. 203 (1997); *cf. Elizabeth Peck v. Lansing School District*, 148 F.3d 619 (6th Cir. 1998) (indicating that the trial court had refused to grant summary judgment because the record was not sufficiently developed to determine "what possible issues of entanglement would arise from the provision of the [secular education] services at the [parochial] school."). Accordingly, it is incumbent on Defendants to put their fingers on some *evidence* of entanglement, ne, *excessive* entanglement, that support the invocation of the Establishment Clause as a bar to the application of neutral tort principles. The Defendants cannot direct this Court to one scintilla of evidence that allowing Bryan Rees to hold the Church Defendants accountable, just as it would hold any other individuals or entities liable, would inexorably involve excessive entanglement with the Church.

Indeed, we already know and will prove that there exists no Church dogma that would have prevented the Defendants from taking reasonable steps to prevent Mr. Baker from abusing other child members of the Church.[2] We know and can prove that the Church was empowered to warn the members of the Church. We know and can prove that the

2. *Cf. Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D. 2d 159, 654 N.Y.S. 2d 791 (N.Y. App. 1997), *cert. denied by Roman Catholic Diocese of Brooklyn v. Kenneth R.*, 522 U.S. 967 ("Here, however, there is no indication that requiring increased supervision of Jimenez or the termination of his employment by the appellant based upon Jimenez's conduct would violate any religious doctrine or inhibit any religious practice.") (citing *Jimmy Swaggart Ministries v. Board of Equalization of Cal.*, 493 U.S. 378 (1990)).

Church was authorized to terminate Mr. Baker's membership with the Church. We know and can prove that the Church was permitted to suggest, encourage and/or require that Mr. Baker undergo evaluation and treatment for his inappropriate attraction to children. We know and can prove that the Church had the power to closely monitor Mr. Baker's contact with children in the Church. In short, it is impossible for the Church to *prove*, on the record as it stands, that applying neutral tort principles to the Church would lead to any excessive entanglement.

With regard to Establishment Clause jurisprudence, "[t]he state of the law completely changed, however, with the Supreme Court's 5-4 decision in *Agostini*." *Lansing School Dept.*, 148 F.3d at 628. Accordingly, even if the Maine Supreme Judicial Court in *Bryan R. did* ground its decision on the Establishment Clause, which we submit is incorrect, the advent of *Agostini* requires this Court to closely scrutinize any Establishment Clause application to this case.

If this Court were to scour the minimal record in this case, it would find that it is barren of any *evidence* of excessive entanglement with the Church. Such evidence, however, is essential.

> There is no indication that, by taking the kind of preventative action required by tort law, the [institutional] defendants would have violated any "doctrine practice or law" of the Roman Catholic Church. In the absence of such a conflict, subjecting the [institutional] defendants to potential tort liability does not violate their right to the free exercise of their religion.

Smith v. O'Connell, 986 F. Supp. 73, 79 (D.R.I. 1997). The Supreme Court of Connecticut recently authored a well-reasoned decision culling the pertinent authority from across the country on this issue. *See Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 716 A.2d 967 (Conn. Super. 1998).[3]

> "The First Amendment does not provide an absolute freedom to act with regard to religious beliefs . . . Instead, that freedom can be regulated for the protection of society. . . The protection of society requires that religious organizations be held accountable for the injuries they cause to third persons." (Citations omitted.) *Konkle v. Henson*, [672 N.E. 2d 450, 456 (Ind. App. 1996)]. "To hold otherwise would impermissibly place a religious leader in a preferred position in our society." *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 336 (5th Cir. 1998). *See also Kenneth R. v. Roman Catholic Diocese*, 229 App. Div. 159, 165, 654 N.Y.S.2d 791 (1997) (religious entities have some duty to prevent injuries caused by persons in their employ whom they have reason to believe will engage in injurious conduct); *Jones by Jones v. Trane*, 153 Misc. 2d 822, 829, 591 N.Y.S. 927 (1992) (court would not dismiss negligence claims where misconduct charged is sexual abuse of infant.). In dicta, a Florida appellate court stated that "the Academy of Florida Trial Lawyers makes a convincing case that the First Amendment does not protect the church when the acts of the clergy involve children and are criminal in nature . . . [J]ust as

3. Decided June 17, 1998.

> *the state may prevent a church* from offering human sacrifices, it may protect its children against injuries caused by pedophiles by authorizing civil damages against a church that knowingly (including should know) creates a situation in which such injuries are likely to occur." *Doe v. Dorsey*, 683 So. 2d 614, 617 (Fla. Dist Ct. App. 1996). "Since the Supreme Court has consistently failed to allow the Free Exercise Clause to relieve [an] individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs, the defendants can not appropriately implicate the First Amendment as a defense to their alleged negligent conduct." (Internal quotations omitted.) *Nutt [v. Norwich Roman Catholic Diocese*, 921 F. Supp. 66, 74 (D. Conn. 1995)] "The Free Exercise Clause might well prohibit this court from interfering in the manner in which the Diocese supervised a priest's performance of Mass, or confession, but it certainly cannot prohibit this court, from determining whether the Diocese should be liable for negligently allowing its employees to engage in criminal conduct." *Reed v. Zizka*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV950555221S, 1998 WL 123050 (March 5, 1998, Aurigemma, J.).

Rosado, 716 A.2d at 971. Of special significance to the *Rosado* Court was the fact that the torts for which the minor plaintiffs were suing the church arose out of *criminal* conduct against *minors* — sexual assault and sexual exploitation of minors.

> The court finds that the free exercise of religion clause and the establishment clause of the first amendment to the federal constitution do not prevent a state from prohibiting criminal conduct on the part of clergy through laws not aimed at the promotion or restriction of religious beliefs. *Nutt*, [921 F. Supp. at 74]. To rule otherwise would result in declaring the state and its inhabitants unable to seek redress when clergy are accused of endangering the welfare and safety of minors, regardless of state law in place to protect such minors from the very abuses alleged.

Id. at 973.

The liability Bryan Rees seeks to attach to the Church Defendants in this case is *direct* liability for their failure to take reasonable and appropriate actions in light of a clear and foreseeable threat of harm to children whose welfare they had to opportunity and the obligation to protect. Mr. Rees has alleged (1) breach of fiduciary duty, (2) negligent infliction of emotional distress, and (3) intentional (reckless) infliction of emotional distress. We aver that the Church Defendants *knew* about Mr. Baker's dangerous propensities, were required by decisional law and common sense, to take reasonable steps to avert future tragedy (steps within its authority to take) but callously and/or ignorantly failed to take such steps, leading directly to the repeated sexual abuse of Bryan Rees.

In light of *Agostini*, we submit that the Maine Supreme Judicial Court made an error of law in *presuming* that the application of neutral tort principles to a religious institution would ineluctably involve the government in excessive

entanglement with religious affairs. It is not sufficient for the Church to merely intone "Establishment Clause" as a shield against Mr. Rees' suit. The Church must prove, by adducing facts admissible in a court of law, that subjecting the Church to the same common law principles by which the rest of us live would violate the Constitution. The Church wants special rights in this case. Before this Court dispenses such rights to the Church, the Church must lucidly explain why it should be entitled to solicitous care by this tribunal. On the record before this Court, it is impossible for the Church to shoulder that burden. Accordingly, this case should be remanded so that we can prepare the case for trial.

II. THE FREE EXERCISE CLAUSE DOES NOT BAR BRYAN REES' CLAIMS

The Jehovah's Witnesses Defendants argue that even assuming all of the facts alleged in the complaint are true, this Court and this State has no business holding them accountable for Mr. Rees' suffering. They proclaim the Free Exercise Clause of the United States Constitution grants them "religious liberty" that allows them to harbor a known pedophile, to place him *untreated* in positions within the Church that give him access to his prey, children — all without bearing any civil liability or any responsibility of any kind whatsoever for the tragic dénoument that they scripted by their action and inaction.

That argument is not only abhorrent as a matter of human morality and common sense, but it is also incorrect as a matter of law. A very substantial body of law emanating from this very Court makes plain that safeguarding and protecting the children of this country is one of the most compelling interests a state can articulate:

> **[t]he State's traditional and "*transcendent* interest in protecting the welfare of children."** *Maryland v. Craig*, 497 U.S. 836, 855 (1990) (quoting *Ginsberg v. New York*, 390 U.S. 629, 640 (1968)) (emphasis added).
>
> **It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." . . . "The prevention of sexual exploitation and abuse of children constitutes a government objective of *surpassing importance*."** *New York v. Ferber*, 458 U.S. 747, 56-58 (1982) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)) (emphasis added).
>
> **The state has a very strong interest, repeatedly recognized, in the protection of children from abuse, whether by their parents or anyone else.** *Brown v. Ives*, 129 F.3d 209, 212 (1st Cir. 1997) (citing *Ginsberg v. New York*, 390 U.S. 629, 640 (1968)).
>
> **"The state has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.' "** *Williams v. City of Lewiston*, 642 F.2d 26, 28 (1st. Cir. 1981) (quoting *Ginsberg*, 390 U.S. at 640-41) (emphasis added).

In *Surinach v. Pesquera De Busquets*, 604 F.2d 73, 80 (1st Cir. 1979), the court noted that the Puerto Rico Department

of Consumer Affairs (which had subpoenaed documents from the Roman Catholic Church in order to investigate the operating costs of Roman Catholic schools in Puerto Rico) had not even claimed that its interests rose "to the level of ***those which have been found to outweigh First Amendment religious freedoms***." (emphasis added) (citing *inter alia Prince v. Massachusetts*, 321 U.S. at 168-69 (state's interest in protecting children from physical harm and exploitation as street proselytizers overrides religious dictates); *King County Hospital*, 390 U.S. 598 (state may override religiously motivated decision of parents to withhold blood transfusion necessary to save child's life)). In *Hill*, 703 F. Supp. at 1037 the court framed it this way: "***[i]t is difficult to imagine a more legitimate state interest than that of protecting vulnerable and impressionable school-age children from the possibility of either physical harm or immoral influences***.") (emphasis added).

So in any balancing of interests to determine the constitutionality of legislation or common law tort liability, the side of the scale that contains the interests of the children must crash through the floor by the immense weight of this moral imperative.

With regard to the other side of the scale — the Church's interest in unfettered and exclusive discretion regarding how to discipline and protect its members, if at all — there is another great number of cases supporting the notion that the Free Exercise Clause of the United States Constitution is not an absolute imperative. There are many instances where the religious freedoms that the Jehovah's Witnesses Defendants trumpet are infringed, impacted and/or destroyed by other interests which are more compelling in a given case.

As early as the late 1800's, in a case with special significance to the Jehovah's Witnesses Defendants, the Supreme Court articulated its views about a religious order demanding immunity from prosecution for a general, neutral criminal law proscribing polygamy:

> However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes, as prompted by the passions of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretense that, as religious beliefs, their supporters could be protected in their exercise by the constitution of the United States. Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.

Davis v. Beason, 133 U.S. 333, 342-43 (1890). This Court unequivocally denied the Jehovah's Witnesses the special rights they requested:

> Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Reynolds v. U.S., 98 U.S. 145, 166-67 (U.S 1878).

The Free Exercise Clause of the United States Constitution provides substantial protection for lawful conduct grounded in religious belief, however, "not all burdens on religion are unconstitutional . . . [t]he state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *Bob Jones University v. U.S.*, 461 U.S. 574, 603 (1983) (quoting *United States v. Lee*, 455 U.S. 252, 257-58 (1982)). Indeed, the Supreme Court has on occasion recognized governmental interests so compelling as to allow even regulations prohibiting religiously based conduct. *See Prince*, 321 U.S. 158 (neutrally cast child labor laws prohibiting sale of printed materials on public streets could be applied to prohibit children from dispensing religious literature). In *Prince*, "the Court found no constitutional infirmity in 'excluding [Jehovah's Witness children] from doing there what no other children may do.' " *Bob Jones*, 461 U.S. at 603 (quoting *Prince*, 321 U.S. at 170).

In one of the more recent decisions from the Supreme Court, *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878, 879, 881 (1990), the Court declined to hold that religious use of peyote was beyond the prohibitory reach of general criminal laws.

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in *Minersville School Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 594-595, 60 S. Ct. 1010, 1012-1013, 84 L. Ed. 1375 (1940): "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted)." We first had occasion to assert that principle in *Reynolds v. United States*, 98 U.S. 145, 25 L. Ed. 244 (1879), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to

> the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* at 166-167.
>
> . . .
>
> Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now.

Moreover, there is even a question as to whether the tort liability we seek to attach to the Jehovah's Witnesses Defendants must be accompanied by any compelling governmental interest. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) the Supreme Court commented as follows: "[i]n addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." It is beyond peradventure that the tort principles we seek to apply to the Church Defendants are "neutral and of general applicability."

And if one is to do any balancing at all, then we should try to isolate the religious practices that are burdened or impacted. What are they in this case? The right to allow a child molester more opportunities to molest, free of any

warning to the parents of unsuspecting victims and of any government intervention including financial liability for the lives that are destroyed or impaired? How is that important to the Church? Is the molestation of children under their care something that is advocated and practiced as a central religious tenet? If so, is there any doubt that the government could punish criminally those liable for the child molestation? I simply cannot conceive of any justification for the Church's actions/inactions in this case that would tip the scales that are weighted down so heavily on the other side by a "transcendent," "surpassing," and "compelling" state interest.

There are times during otherwise mundane "motion practice," when it becomes starkly clear that quite apart from the dry research, writing and argument involved, there are real people, real issues that have real consequences. This is just such a case. We can seek to distinguish or harmonize all manner of precedents in support of various propositions. Yet common sense and our own hearts can sometimes reveal the answer to a legal dilemma. Recently, I read a article in Parade Magazine, part of the Maine Sunday Telegram (March 29, 1998), entitled "Our Endangered Species" by Andrew Vachss. His thesis is startling and very relevant to the instant dispute.

> Although we all believe our human species to be the highest point on the evolutionary scale, there is one critical area in which we have failed to evolve, one area in which we do not represent an improvement upon our predecessors. And this is a failure so fundamental, so critical, that our longterm survival is at stake. Ultimately, it poses a greater threat than war, poverty, hunger, crime,

racism and tribalism — even of the genocidal variety — combined.

That fundamental failure is this: We are not protecting and preserving our own. Our notion of the human "family" as the safeguard of our species has not evolved. Instead, it has gone in the opposite direction — it has devolved.

It has devolved to the extent that we tolerate unprotective, even violently abusive parents. It has devolved to the extent that we tolerate predators within a child's circle of trust — in schools, in clubs, within religious organizations. It has devolved to the extent that abusers, even when they have been identified, are permitted further opportunities to prey.

. . .

Among other mammals, nonprotective parents are considered defective by other pack members. Not only will they decrease the pack's numbers through direct attacks on their own young, but they also cannot be relied upon to guard the offspring of others while pack members forage, hunt or gather. And so they are expelled. Likewise, predators within a species are not tolerated. They are banished, avoided or killed. These are not moral judgments; they are biologically driven and, among all species but our own, compelling.

Human animals, by contrast, have tolerated — even tacitly condoned — the nonprotector and the

> predator, leading to an escalation of the rape, murder and torture of *our* children. Rather than making their survival, and the survival of our species, an unquestioned priority, we watch indifferently while the evolution of cruelty continues.

In the context of a religious organization, or any other group, that allows these predators additional opportunities to prey, to destroy the fragile bodies and minds of children, there is only one way to force a change — ***make them pay for it!!*** The individuals who are caught and prosecuted may suffer criminal penalties, but that is not sufficient. The religious organizations that are aware of a pedophile in their midst must do more than simply "keep an eye on him," while giving him more access to the lambs in their care. They cannot just keep the secret closely guarded and hope that things will be alright. And they cannot feebly point to the First Amendment as some kind of absolution for the sin of omission, for the sin of failing to safeguard and protect the children whom they know or should know will be victimized by one whom they had the power, opportunity, and obligation to stop.

Personal responsibility is not just for individuals. It is also for business organizations, clubs, hospitals, law firms, employers, and religious organizations. Compensation and punishment in the form of civil liability is intimately and inexorably a part of this culture. Religious organizations cannot exempt themselves from that culture.

CONCLUSION

For all of the reasons articulated in this brief, and more importantly because justice and the rights of man — those fundamental, inalienable rights to which *all* humans, constitution or not, are entitled[4] — require it, we beseech this Court to vacate the Maine Supreme Judicial Court's decision, and remand this case for factual development and trial.

Respectfully submitted,

MICHAEL J. WAXMAN
Attorney for Petitioner
371 Fore Street
Suite 303
Portland, ME 04101
(207) 772-9558

4. *See* Mill, John Stuart, *On Liberty*.

APPENDIX

APPENDIX A — OPINION OF THE MAINE SUPREME JUDICIAL COURT DATED AND DECIDED OCTOBER 18, 1999

MAINE SUPREME JUDICIAL COURT

Decision: 1999 ME 144
Docket: Cum-98-531

BRYAN R.

v.

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., et al.

Argued: May 4, 1999
Decided: October 18, 1999

Panel: WATHEN, C.J., and CLIFFORD, DANA, *SAUFLEY*, and ALEXANDER, JJ.

SAUFLEY, J.

Bryan R. alleges that he was sexually abused during several of his adolescent years by Larry Baker, an adult member of his church. He has obtained a judgment against Baker, but his complaint against the church and its elders was dismissed by the Superior Court (Cumberland County, *Calkins, J.*) for failure to state a claim. He appeals from the judgment dismissing the claims against the church defendants. We affirm the judgment.

Appendix A

I. BACKGROUND

Because this matter was presented to the Superior Court on the church's motion to dismiss, we take the material allegations of the complaint as admitted. *See McAfee v. Cole*, 637 A.2d 463, 465 (Me. 1994). The following facts were alleged in Bryan's complaint:

The Watchtower Bible and Tract Society is a New York-based nonprofit corporation, better known as the Jehovah's Witnesses. It is a religious organization. When the events at issue occurred, Robert Wells, Pat LaBreck, and Bryan's stepfather were "elders" and members of the "judicial body" of the Augusta congregation of the church, Larry Baker was an adult member of the church, and Bryan R. and his family were members of the congregation.

At some time in the past, also while Larry Baker was an adult member of the church, he molested a minor member of the congregation identified as "John Doe." The elders of the Augusta congregation knew that Baker had molested John Doe. Wells, LaBreck, and Bryan's stepfather, in their roles as the judicial body of the Augusta congregation, decided on the following response to Baker's actions: (1) they demoted Baker from "ministerial servant" to "baptized entry level member"; (2) they "privately rebuked" Baker; and (3) and they temporarily "forbade Baker from having any contact with minor members" of the church. The defendants did not alert the members of the church to Baker's misdeeds.[1]

---

1. Bryan alleges that among the options available to the defendants upon discovering Baker's misdeeds were: (1) "kick[ing]

(Cont'd)

Appendix A

Eventually, Baker was allowed by the defendants to resume activities as an ordinary member of the church. Bryan alleges that Baker was able to earn his trust and confidence because the church placed Baker in a position of leadership and respect. Bryan was molested by Baker from 1989 through 1992 while Bryan was a teenager and lived next door to Baker. He alleges that his stepfather, who was aware of Baker's history, nonetheless allowed Baker to spend time alone with Bryan at his home. As a result of Baker's repeated sexual abuse, Bryan suffered significant emotional harm necessitating psychiatric hospitalization.

Bryan filed this action against Baker, the church, and its elders to recover damages for the injuries he suffered as a result of Baker's assaults on him. In count I of his complaint, he alleged that each of the defendants breached a fiduciary duty owed to him as a member of the congregation; in counts II and III, he alleged that the defendants were liable to him for negligent infliction of emotional distress and intentional infliction of emotional distress. Count IV contained Bryan's claim against Baker for battery, and in count V, Bryan alleged that his stepfather was individually liable for negligence. The stepfather was later dismissed from the action pursuant to a joint motion filed by the parties, thereby resolving count V.

(Cont'd)
him out" of the Watchtower Society; (2) publicly rebuking him for his actions; (3) requiring him to undergo "professional evaluation for sexual impulse control"; (4) and requiring him to undergo "professional treatment for sexual impulse control." Bryan alleges that the defendants took none of these steps.

Appendix A

The Watchtower Society, Robert Wells, and Pat LaBreck filed a motion to dismiss each of the claims against them. After a hearing, the Superior Court granted the motion, concluding that Bryan had failed to state a claim, relying on *Swanson v. Roman Catholic Bishop of Portland*, 1997 ME 63, 692 A.2d 441. Bryan's appeal from that judgment was remanded for lack of finality because the claims against Larry Baker had not yet been adjudicated. The Superior Court, based on a stipulation of the parties, entered judgment against Baker. After the entry of judgment against Baker, Bryan appealed from the court's judgment dismissing the claims against the church defendants. Baker did not appeal the judgment against him.

II. DISCUSSION

A. Standard of Review and Claims Asserted

In reviewing the trial court's dismissal of a complaint, we "examine the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief" pursuant to a valid cause of action. *McAfee*, 637 A.2d at 465, *quoted in Hamilton v. Greenleaf*, 677 A.2d 525, 527 (Me. 1996)). "The legal sufficiency of a complaint challenged pursuant to M.R. Civ. P. 12(b)(6) is a question of law." *Hamilton*, 677 A.2d at 527.

Before examining the claims asserted by Bryan, it is instructive to address those claims that he does not assert. He does not allege that Baker was an agent or employee of the church. Nor does he claim that Baker occupied any clerical position such as priest, minister, or pastor. *Cf.*

Swanson, 1997 ME 63, ¶ 13, 692 A.2d at 445.[2] Moreover, the complaint does not allege that the church affirmatively placed Baker in a position of control and supervision of children, such as a Sunday school teacher or youth coordinator, or that the church knowingly placed Baker in a position where he could sexually abuse children within a church setting. Rather, Bryan alleges that Baker was "able to *earn* [Bryan's] trust and confidence" because of his position of power and authority in the church.[3] These allegations place Baker in a relationship to Bryan that was not different in quality from any other member in good standing of the church.

The crux of Bryan's claim is that the church, because of an alleged special relationship with its members, has a duty to protect its members from each other, at least when the church and its agents are aware of a potential danger posed by a member. Because the church elders knew of Baker's propensity to abuse children, Bryan argues that they had an independent duty to protect him from Baker.[4] He addresses

---

2. Because Baker is not alleged to have been an employee or agent of the church, we are not called upon to determine whether the "balancing of interests" we referenced in *Swanson* may require a different result when a child, rather than an adult, is injured by an agent of the church. *Swanson*, 1997 ME 63, ¶ 13, 692 A.2d at 445.

3. He also argues that the church allowed Baker to lead "Field Ministry Excursions" which included Bryan, thereby implying that by cloaking Baker with power and respect, the church negligently allowed Baker to gain Bryan's trust.

4. Had the clergy members of the church learned of Baker's assault on Joe Doe more recently, they would have had a statutory

(Cont'd)

that duty through three separate counts. We address each count in turn.

B. Breach of Fiduciary Duty

Bryan bases his first theory of liability on an alleged duty on the part of the church to protect him from the actions of dangerous third parties. Whether a defendant owes a duty of care to a plaintiff is a matter of law for the court. *See McPherson v. McPherson*, 1998 ME 141, ¶ 8, 712 A.2d 1043, 1045; *Fish v. Paul*, 574 A.2d 1365, 1366 (Me. 1990). In determining whether a duty exists, we must ascertain whether the alleged wrongdoer is " 'under any obligation for the benefit of the particular plaintiff.' " *Trusiani v. Cumberland & York Distribs., Inc.*, 538 A.2d 258, 261 (Me. 1988) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 356 (5th ed. 1984)).

There does not exist a general obligation to protect others from harm not created by the actor. "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon

---

(Cont'd)
duty to report that information to the Department of Human Services and to the appropriate district attorney's office, unless the information was obtained during confidential communications. *See* 22 M.R.S.A. § 4011(1)(D) (Supp. 1998). Bryan did not raise this issue before the Superior Court, and the amendment adding clergy to the list of mandated reporters was not enacted until long after the facts alleged in the complaint took place. *See* P.L. 1997, ch. 251, § 1 (effective Sept. 19, 1997) (adding "clergy members" to the list of those responsible for reporting child abuse).

him a duty to take such action." RESTATEMENT (SECOND) OF TORTS § 314 (1965). In other words, the mere fact that one individual knows that a third party is or could be dangerous to others does not make that individual responsible for controlling the third party or protecting others from the danger.[5]

Indeed, at early common law, inaction or nonfeasance was seldom actionable. As commentators have noted, "[l]iability for nonfeasance was . . . slow to receive recognition in the law." KEETON, *supra*, § 56, at 373. Over decades, however, courts have come to recognize a duty on the part of certain groups to protect others from harm caused

---

5. In limited circumstances, courts have recognized that an actor may have a duty to warn third parties of the dangerous propensities of another when the actor has a special relationship with the dangerous person and the person threatened is a specific, foreseeable, and identifiable victim of the dangerous person's threats. *See, e.g., Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 345 (Cal. 1976); *Thompson v. County of Alameda*, 614 P.2d 728, 734-35 (Cal. 1980) (declining to extend holding in *Tarasoff* when neither a special relationship existed nor had a specific individual been threatened); *Brenneman v. State*, 256 Cal. Rptr. 363, 367 (following *Thompson* in holding that "public entities and employees have no affirmative duty to warn of the release of an inmate with a violent history who has made nonspecific threats of harm directed at nonspecific victims"); *Leonard v. Latrobe Area Hospital*, 625 A.2d 1228, 1232 (Pa. 1993) (following *Thompson*, finding "no common law rule that imposes a duty on a psychologist or psychiatrist to warn a non-patient of a patient's dangerous propensities"). *But see, e.g., Perreira v. State*, 768 P.2d 1198, 1201 (Co. 1989) (holding that psychiatrist has duty to third parties to exercise due care in treatment and release of committed patients).

by third parties. "Certain relationships are protective by nature, requiring the defendant to guard his charge against harm from others." *Id.* § 56, at 383.[6] Nonetheless, "in the absence of the requisite relationship, there generally is no duty to protect others against harm from third persons." *Id.* § 56, at 385.

Even with the emergence of expanded liability for nonfeasance, that principle has remained clear — in instances of "nonfeasance rather than misfeasance, and absent a special relationship, the law imposes no duty to act affirmatively to protect someone from danger unless the dangerous situation was created by the defendant." *Jackson v. Tedd-Lait Post No. 75*, 1999 ME 26, ¶ 8, 723 A.2d 1220, 1221. Only when there is a "special relationship," may the actor be found to have a common law duty to prevent harm to another caused by a third party.[7] There is simply "no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless . . . a special relation exists

---

6. Among those who have been held in certain circumstances to have a duty of care to protect others from harm by third parties are: innkeepers and proprietors of similar establishments, *see Brewer v. Roosevelt*, 295 A.2d 647, 651 (Me. 1972); *Schultz v. Gould Academy*, 332 A.2d 368, 371 (Me. 1975); *Tenney v. Atlantic Assocs.*, 594 N.W.2d 11, 17 (Iowa 1999); jailers, *see Harrison v. Ohio Dep't of Rehabilitation & Correction*, 695 N.E.2d 1248, 1253 (Ohio Ct. Cl. 1997); and schools, *see Hill v. Safford Unified Sch. Dist.*, 952 P.2d 754, 756 (Ariz. Ct. App. 1997).

7. We do not address herein duties created by statute. *See, e.g., Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1666 (1999) (recognizing a statutorily imposed duty on the part of schools to protect children from abuse by other children or adults).

between the actor and the other which gives to the other a right to protection." RESTATEMENT (SECOND) OF TORTS § 315(b) (1965).[8]

Therefore, in order to determine whether the church owed Bryan a duty of care to protect him from other members of the church, we must determine whether a special relationship, reviewable by the secular courts, exists between a church and its members in this context. Bryan asserts that such a relationship does exist, and he refers to it as a "fiduciary" relationship. "One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation." *Id.* § 874. He bases the alleged fiduciary relationship on the "substantial trust and confidence" he placed in the church, and alleges that the church breached its fiduciary duty to him when it failed to warn him about Baker and failed to exert some type of control over Baker's actions.

Thus, we are presented with two questions: first, whether we would recognize a cause of action against a voluntary social or religious organization for breach of a fiduciary duty

---

8. *Accord Gragg v. Wichita State Univ.*, 934 P.2d 121, 128 (Kan. 1997) (holding that corporate sponsors of fireworks on a university campus had no duty to control conduct of third party); *Hoff v. Vacaville Unified Sch. Dist.*, 968 P.2d 522, 527-29 (Cal. 1998) (holding that a school had no duty to protect pedestrian from student); *cf. J.E.J. v. Tri-County Big Brothers/Big Sisters, Inc.*, 692 A.2d 582, 584-85 (Pa. Super. Ct. 1997) (holding that an organization had no duty to warn of potential danger from sexual abuse of one of its volunteers where injured child was not associated with organization's programs).

to protect the organization's members from each other. Put another way, we must determine whether a voluntary organization such as a church has a special relationship with its members that gives rise to a duty to protect those members from a class of third parties — other members of the organization. Second, we are asked to determine whether such a cause of action could be maintained against a church in light of the free exercise protections contained in the First Amendment.

On the facts alleged in the complaint, we conclude that Bryan has failed to plead a fiduciary relationship with sufficient particularity, and we decline to recognize a general common law duty on the part of an organization such as a church to protect its members from each other. Accordingly, we do not reach the constitutional issue.

We begin by addressing the identification of a fiduciary relationship. Bryan has not provided any support for his assertion that a religious organization has a fiduciary relationship with its members that requires it generally to protect those members from other members of the church who may present a danger. Nor have we ever found a fiduciary relationship to exist in the circumstances presented here. We recognize, as have many courts, that it is often difficult to articulate exactly what proof is required to establish the existence of a fiduciary relationship in particular circumstances.[9] A fiduciary relationship has been described

---

9. The term "fiduciary" is "one of the most ill-defined, if not altogether misleading terms in our law." *Martinelli v. Bridgeport*

(Cont'd)

as "something approximating business agency, professional relationship, or family tie impelling or inducing the trusting party to relax the care and vigilance ordinarily exercised." *L.C. v. R.P.*, 563 N.W.2d 799, 801-02 (N.D. 1997) (internal quotation and alterations omitted).

We have described the salient elements of a fiduciary relationship as: (1) "the actual placing of trust and confidence in fact by one party in another," and (2) "a great disparity of position and influence between the parties" at issue. *Morris v. Resolution Trust Corp.*, 622 A.2d 708, 712 (Me. 1993). A fiduciary relationship has been found to exist in several categories of relationship, including business partners, *see Rosenthal v. Rosenthal*, 543 A.2d 348, 352 (Me. 1988), families engaged in financial transactions, *see Estate of Campbell*, 1997 ME 212, ¶ 9, 704 A.2d 329, 331-32, and corporate relationships, *see Moore v. Maine Indus. Servs.*,

---

(Cont'd)

Roman Catholic Diocesan Corp., 10 F. Supp. 2d 138, 149 (D. Conn. 1998) (internal quotation omitted). One court offered the following explanation:

> Some of the indicia of a fiduciary relationship include the acting of one person for another; the having and exercising of influence over one person by another; the inequality of the parties; and the dependence of one person on another. Fiduciary duty arises, for example, between attorneys and clients, guardians and wards, and principals and agents.

Doe v. Hartz, 52 F. Supp. 2d 1027, 1059 (N.D. Iowa 1999) (internal quotations omitted).

Inc., 645 A.2d 626, 628 (Me. 1994); *Webber v. Webber Oil Co.*, 495 A.2d 1215, 1224-25 (Me. 1985).

We have noted, however, that a "general allegation of a confidential relationship is not a sufficient basis for establishing the existence of one." *Ruebsamen v. Maddocks*, 340 A.2d 31, 35 (Me. 1975). As with any duty, its existence must be informed by "the hand of history, our ideals of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall." *Trusiani*, 538 A.2d at 261. Although a fiduciary duty may be based on "moral, social, domestic, or[ ] merely personal [duties]," *Ruebsamen*, 340 A.2d at 34, it does not arise merely because of the existence of kinship, friendship, business relationships, or organizational relationships. A fiduciary duty will be found to exist, as a matter of law, only in circumstances where the law will recognize both the disparate positions of the parties and a reasonable basis for the placement of trust and confidence in the superior party in the context of specific events at issue.[10] A court, therefore, must have before it specific facts regarding the nature of the relationship that is alleged to have given rise to a fiduciary duty in order to determine whether a duty may exist at law.

Thus, because the law does not generally require individuals to act for the benefit of others, the factual foundations of an alleged fiduciary relationship must be pled with specificity. Simple recitations of a trusting relationship

---

10. Relationships "will not give rise to a *confidential relation* . . . unless there is evidence of superior intellect or will on the part of the one or the other, or of trust reposed or confidence abused." *Ruebsamen*, 340 A.2d at 35 (emphasis added).

will not suffice for identifying a fiduciary duty. In order to survive a motion to dismiss a claim for breach of fiduciary duty, the plaintiff must set forth specific facts constituting the alleged relationship with sufficient particularity to enable the court to determine whether, if true, such facts could give rise to a fiduciary relationship. *See Clappison v. Foley*, 148 Me. 492, 497, 96 A.2d 325, 328 (1953); *see also Gibson v. Brewer*, 952 S.W.2d 239, 245 (Mo. 1997) (en banc).

The allegations set out in Bryan's complaint do not provide the "sufficient particularity" required in pleading a fiduciary relationship. *See Ruebsamen*, 340 A.2d at 35. Instead, the facts alleged by Bryan as constituting a fiduciary relationship simply reiterate the basic elements of a fiduciary relationship. Recitation of those basic elements cannot substitute for an articulation in the complaint of the specific facts of a particular relationship. The allegation that Bryan placed "substantial trust and confidence" in the elders of the church and trusted them "to protect him and guide him" does not set forth the factual foundations for a special responsibility on the part of the church. Such vague and nonspecific allegations are wholly insufficient to make out a claim of a special relationship between the organization and its members.

Finally, the complaint does not allege that there were aspects of Bryan's relationship with the church that were distinct from those of its relationships with any other members, adult or child, of the church. The creation of an amorphous common law duty on the part of a church or other voluntary organization requiring it to protect its members from each other would give rise to "both unlimited liability

and liability out of all proportion to culpability." *Cameron v. Pepin*, 610 A.2d 279, 283 (Me. 1992); *see also Jackson*, 1999 ME 26, ¶ 8, 723 A.2d at 1221 (finding no special relationship between the American Legion and a "regular customer" except as created by the Maine Liquor Liability Act, 28-A M.R.S.A. §§ 2501-2520 (1988 & Supp. 1998)); *Hughes v. Beta Upsilon Bldg. Ass'n*, 619 A.2d 525, 527 (Me. 1993) (finding no duty to prevent spectator from injuring himself during fraternity activities).

Accordingly, accepting the facts as alleged in the complaint, the Superior Court did not err in dismissing that portion of the complaint which depended upon the imposition of a generalized fiduciary duty on the part of the church to protect members of its congregation from other members.

C. Intentional Infliction of Emotional Distress

Bryan next claims that the defendants may be responsible for intentionally inflicting emotional distress upon him. If allowed to proceed, Bryan would be required to demonstrate that the church's conduct was "so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious [and] utterly intolerable in a civilized community." *See Finn v. Lipman*, 526 A.2d 1380, 1382 (Me. 1987). In addition, he would be required to demonstrate that the church, through this specific conduct, intentionally or recklessly inflicted emotional distress, or was certain or substantially certain that emotional distress would result. *See id.*; *see also Davis v. Currier*, 1997 ME 199, ¶ 5, 704 A.2d 1207, 1209; *Colford v. Chubb Life Ins. Co.*, 687 A.2d 609, 616-17 (Me. 1996).

Appendix A

In support of his claim, Bryan alleges that the church knew of Baker's propensity to harm children, that it failed to announce Baker's misdeeds to the congregation, that, through its agents, it devised a plan to address his transgressions, and that this plan was "woefully inadequate" to protect against future harm of minors, including minor members of the church. Bryan asserts that the church's failure to excommunicate Baker, its failure to shun him, and its eventual decision to allow Baker to a resume a position of leadership and respect within the church constituted acts that were sufficiently extreme and outrageous that they exceeded all possible bounds of decency.

We do not lightly dismiss the harm caused by the sexual abuse of children, nor do we misapprehend the enormity of that harm if inflicted in the context of religious activities.[11] On these facts, however, we conclude that the effort to hold the church responsible, in addition to the wrongdoer himself, would require direct inquiry into the religious sanctions, discipline, and terms of redemption or forgiveness that were available within the church in the context of this claim, an inquiry that would require secular investigation of matters that are almost entirely ecclesiastical in nature.[12]

State courts may not interfere in matters concerning religious doctrine or organization. *See Swanson v. Roman*

---

11. Bryan does not allege that Baker molested him during any of the church's activities.

12. The *amicus* provides multiple examples of differing principles applied in various religions to determine whether and under what circumstances a church can or should discipline its members and what methods of discipline, counseling, and spiritual guidance are available.

Catholic Bishop of Portland, 1997 ME 63, ¶ 7, 692 A.2d 441, 443. A religious organization's decisions and actions when providing advice, counsel, or religious discipline to its members will be based on the particular religious beliefs of the organization, and thus, like the decisions and actions with respect to the organization's government, cannot by themselves form the basis for secular liability. *See id.* ¶ 12, 692 A.2d at 445 (quoting *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780, 790 (Wis. 1995) and *Schmidt v. Bishop*, 779 F. Supp. 321, 332 (S.D.N.Y. 1991)). Allowing a secular court or jury to determine whether a church and its clergy have sufficiently disciplined, sanctioned, or counseled a church member would insert the State into church matters in a fashion wholly forbidden by the Free Exercise Clause of the First Amendment.

The Superior Court did not err in dismissing that portion of Bryan's complaint asserting a claim of intentional infliction of emotional distress against the church and its elders.

D. Negligent Infliction of Emotional Distress

Although it is no longer necessary for a plaintiff to plead or prove the existence of a separate tort in order to assert a claim for negligent infliction of emotional distress, a plaintiff must nonetheless demonstrate that the defendant owed him a duty of care and must prove the breach of that duty of care by the defendant. *See Devine v. Roche Biomed. Labs., Inc.*, 637 A.2d 441, 447 (Me. 1994). The removal of the necessity for a plaintiff to allege an underlying tort or physical impact did not create a new cause of action, but simply removed the barriers that prevented plaintiffs from proceeding with claims

already recognized in Maine, when the only damage suffered was to the psyche. *See id.*

In examining the scope of this tort, we have declined to apply a pure foreseeability analysis to determine when a duty arises. *See Cameron v. Pepin*, 610 A.2d 279, 284 (Me. 1992). Only where a particular duty based upon the unique relationship of the parties has been established may a defendant be held responsible, absent some other wrongdoing, for harming the emotional well-being of another. *See, e.g., Bolton v. Caine*, 584 A.2d 615, 618 (Me. 1990) (holding that a physician-patient relationship gives rise to a duty to avoid emotional harm from failure to provide critical information to patient); *Gammon v. Osteopathic Hosp. of Me.*, 534 A.2d 1282, 1285 (Me. 1987) (holding that a hospital's relationship to the family of deceased gives rise to a duty to avoid emotional harm from handling of remains); *Rowe v. Bennett*, 514 A.2d 802, 806-07 (Me. 1986) (holding that the unique nature of psychotherapist-patient relationship gives rise to a duty of care to the patient).

We have never recognized a relationship between churches and their members of the type that would give rise to a duty to avoid psychic injury to those members, and we could not do so without inquiring into the ecclesiastical relationship whose components are not within the purview of the secular courts. *See Swanson*, 1997 ME 63, ¶ 7, 692 A.2d at 443. The court did not err in dismissing Bryan's claim of negligent infliction of emotional distress.

The entry is:

Judgment affirmed.

APPENDIX B — DECISION AND ORDER OF THE SUPERIOR COURT, STATE OF MAINE, CUMBERLAND COUNTY ON DEFENDANTS' MOTION TO DISMISS DATED AUGUST 18, 1998 AND FILED AUGUST 19, 1998

STATE OF MAINE
CUMBERLAND, SS:

SUPERIOR COURT

CIVIL ACTION
DOCKET NO. CV-98-60

BRYAN REES,

Plaintiff

v.

WATCHTOWER BIBLE AND TRACT SOCIETY, et al,

Defendants

DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

The plaintiff, Bryan Rees, seeks damages from the defendants: Watchtower Bible and Tract Society, which is a religious organization known as the Jehovah's Witnesses; Patrick Labreck and Robert Wells, who are elders of the Augusta congregation of Jehovah's Witnesses; and Larry Baker. In his complaint Rees alleges that between 1989 and 1992, when Rees was fourteen through seventeen years old,

Baker sexually molested him. The sexual abuse of Rees caused him to be hospitalized several times; he also attempted suicide.

Baker and Rees were both members of the Augusta congregation of Jehovah's Witnesses during the relevant time period. According to the complaint, Baker previously sexually molested another boy, who was also a member of the Augusta congregation, and the elders of the congregation were aware of that molestation. Because of that prior molestation the elders demoted Baker and privately rebuked him. The elders also forbade Baker from having any contact with minors who were members of the congregation. The elders did not notify Rees or other members of the congregation that Baker had molested the other child or that he should not have contact with minors. The complaint states that Baker was allowed to resume leadership activities within the congregation which gave him access to minors including Rees. In essence, Rees complains that the elders, when they learned of the prior sexual molestation, should have expelled Baker or taken other actions toward him such as a public rebuke or required him to participate in sexual abuse counseling.

Pending before the court is a motion to dismiss the complaint for failure to state a claim brought by Watchtower Bible and Tract Society and the elders. These defendants argue that all of Rees' claims against them are barred by the religion clauses of the United States and Maine Constitutions, that is, the First Amendment to the United States Constitution and Art. I, § 3 of the Maine Constitution. These defendants also argue that they are entitled to a dismissal of counts I

and II of the complaint, alleging breach of fiduciary duty and intentional infliction of emotional harm.[1] Although it may be possible for the court to dispose of counts I and II without reaching the constitutional defense, the court declines to do so because the constitutional issues remain for count III which alleges negligent infliction of emotional distress. The defendants do not argue that grounds, other than the constitutional grounds, exist for dismissal of count III.

The defendants rely on the recent decision of the Law Court in *Swanson v. Roman Catholic Bishop of Portland*, 1997 ME 63, 692 A.2d 441. In that case a woman and her husband sued the Catholic Church for damages she sustained as the result of a sexual relationship imposed on her by a priest who counseled her. The Swansons claimed that the church negligently supervised the priest. The Law Court concluded that such claim was not constitutionally allowed.

The court based its decision on both the Free Exercise and the Establishment Clauses of the First Amendment to the United States Constitution and the Maine Constitution. *Id.* at ¶ 7. The test that the court applied to determine whether these clauses would be violated is whether "neutral principles of law" could be applied by a court to resolve the Swansons' claim against the church. *Id.* at ¶ 7, 8; *see also Jones v. Wolf*, 443 U.S. 595, 604 (1979). The Law Court found that the trial court would likely have to review church doctrine in order to determine the relationship between the church and

---

1. The claim of battery against Baker is not part of the motion to dismiss.

the priest, *id.* at ¶ 10, and that any award of damages would have a chilling effect which could lead to state control, *id.* at ¶ 12. The court stated: "[T]o impose liability for any deviation from the secular standard is to impair the free exercise of religion and to control denomination governance." *Id.*

The Law Court concluded that negligent supervision claims against a church do not maintain the degree of neutrality required by both the First Amendment to the United States Constitution and the Maine Constitution. The court did not rest its decision entirely on the lack of neutrality, but also applied a balancing test. It balanced the societal interest in imposing civil liability on a church for negligent supervision with the First Amendment freedom of a church to interact with its clergy. It found that the societal interest was not sufficient to overcome the religious freedom.[2]

Rees seeks to distinguish the *Swanson* case on the basis that Mrs. Swanson was an adult and Rees was a child when the acts giving rise to the suits were committed. Rees argues that the compelling state interest in protecting children outweighs the interests of the congregation from invasion by the courts into doctrinal and ecclesiastical matters. Rees asks the court to apply the compelling interest test that the Supreme Court established in *Sherbert v. Verner*, 374 U.S. 398 (1963). That test was utilized in cases under the Free Exercise Clause and involved determining whether there was a compelling state interest in burdening a religious practice,

---

2. Although the court does not specify exactly what the societal interest is, presumably it is the interest in allowing people who have been harmed by the acts of others to seek civil redress in the courts.

whether the burden was narrowly tailored to achieve the state interest, and the weighing of the competing interests. The compelling interest test was abrogated in *Employment Division v. Smith*, 494 U.S. 872 (1990) in favor of the neutral laws of general applicability test, but it remains alive in those cases in which there is neither neutrality or general applicability. *See Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546-47 (1993).

Rees persuasively argues that there is a compelling state interest in protecting children from sexual molestation[3] and that the interest is so compelling that it can outweigh the interest of religious freedom. *See Jehovah's Witnesses v. King County Hospital*, 290 U.S. 598 (1968) (religious decision by parents to withhold blood transfusion necessary to save child's life could be overruled by state); *Prince v. Massachusetts*, 321 U.S. 166 (1943) (societal interests in protecting children outweigh the religious rights of the children and parents in public preaching and distribution of religious literature).

However, even if the interest in protecting children is compelling and even if imposing liability on a congregation is narrowly tailored to achieve that interest, the compelling interest test only applies to one of the religion clauses of the First Amendment. The Establishment Clause, which does not involve a compelling interest test, requires that the governmental intrusion be neutral and not involve an excessive entanglement between the government and the

---

3. "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 757 (1982).

church. *Lemon v. Kurtzman*, 402 U.S. 602, 612-13 (1971); *Jones v. Wolf*, 443 U.S. 595, 604 (1979). In *Swanson*, the Law Court held that by imposing liability upon a church or its elders the state would not be sufficiently neutral and the trial court inquiry would involve excessive entanglement into the doctrine and affairs of the church. Although application of the compelling interest test might assist Rees in distinguishing *Swanson* insofar as the Free Exercise Clause is concerned, it does not take away the Establishment Clause portion of the *Swanson* holding.

After *Swanson* was decided, at least two courts held that applying neutral and generally applicable principles of state tort law to a religious organization does not violate the First Amendment. *Smith v. O'Connell*, 986 F. Supp. 73 (D.R.I. 1997); *Doe v. Hartz*, 970 F. Supp. 1375 (N.D. Iowa 1997),[4] *rev'd on other grounds*, 134 F.3d 1340 (8th Cir. 1998). However, this court is governed by the decision in *Swanson*, and in that case, the Law Court very clearly held that imposing liability for the tort of negligent supervision would violate the degree of neutrality required by the United States and Maine Constitutions.

Although this case involves different torts from that in *Swanson*, this court discerns no viable distinction that would allow the instant claims to proceed. The *Swanson* court was concerned about the infringement on the church's relationship with its clergy, but an infringement on a church's

---

4. The court denied the Rule 12(b)(6) motion but indicated that if, at the summary judgment stage, a showing of excessive entanglement was made by the church, the First Amendment defense would be successful. *Id.* at 1431.

relationship with its members has the same impact. Breach of fiduciary duty claims have been rejected because of the excessive entanglement. *See H.R.B. v. J.L.G.*, 913 S.W. 2d 92, 98 (Mo. Ct. App. 1995) and cases cited therein.

One jurisdiction, in a case decided after *Swanson*, held that intentional tort liability, as opposed to negligent tort liability, does not offend the First Amendment. *Gibson v. Brewer*, 952 S.W. 2d 239, 248 (Mo. 1997). In that case the court dismissed the negligence claims against the church defendants as violating the First Amendment but refused to dismiss the claim of intentional failure to supervise the clergy. This court is not persuaded that the intentional nature of a tort eliminates excessive entanglement.

For all of these reasons, the court concludes that *Swanson* has foreclosed the relief sought by Rees, and the complaint must be dismissed as to Watchtower Bible and Tract Society and the elders of the Augusta congregation.

ORDER

The motion to dismiss brought by Defendants Watchtower Bible and Tract Society, Patrick Labreck and Robert Wells is granted. The complaint is dismissed as to Defendants Watchtower Bible and Tract Society, Patrick Labreck and Robert Wells.

Dated: August 18, 1998

s/ Susan Calkins
Susan Calkins,
Superior Court Justice

No. 99-1088

IN THE

Supreme Court of the United States

BRYAN R.,

Petitioner,

v.

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

RESPONDENTS' BRIEF IN OPPOSITION

BRUCE C. MALLONEE
Of Counsel
RUDMAN & WINCHELL, LLC
84 Harlow Street
P.O. Box 1401
Bangor, ME 04402-1401
(207) 947-4501

PAUL D. POLIDORO
Counsel of Record
LEGAL DEPARTMENT
WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.
100 Watchtower Drive
Patterson, NY 12563
(914) 306-1000

Attorneys for Respondents

157465

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Was the Maine Supreme Judicial Court correct in holding that, under Maine's common law, neither a church nor its elders have a duty to protect church members from harming each other?

LIST OF PARTIES[1]

Petitioner:
Bryan R.

Respondents:
Watchtower Bible and Tract Society of New York, Inc.
Patrick LaBreck
Robert Wells

STATEMENT PURSUANT TO RULE 29.6

Respondent, Watchtower Bible and Tract Society of New York, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

---

1. This information is included as it was absent from the petition for a writ of certiorari.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
List of Parties	ii
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement of the Case	1
Reasons for Denying the Writ	3
I. The Decision Below Does Not Raise the Question Presented in the Petition.	3
II. This Court Lacks Jurisdiction to Review a State Court Decision Based on Independent and Adequate State Grounds of State Common Law or State Constitutional Law.	4
A. Dismissal of breach of fiduciary duty count was based solely on Maine's common law.	5
B. Dismissal of the negligent infliction of emotional distress count was based on independent and adequate state grounds of Maine's common law.	6

Contents

Page

C. Dismissal of the intentional infliction of emotional distress count was based on the unique facts of this case as well as on independent and adequate state grounds of Maine's constitution. 7

III. There Is No Compelling Reason to Grant the Writ Since There Exists No Conflict of Decisions Among State Courts of Last Resort or a United States Court of Appeals. 10

IV. Petitioner Has Abandoned His Case Against Mr. Wells and Mr. LaBreck. 13

Conclusion 14

TABLE OF CITED AUTHORITIES

Page

Cases:

Ayon v. Gourley, 47 F. Supp. 2d 1246 (D. Colo. 1998), *aff'd*, 185 F.3d 873 (CA10 1999) 13

Bolton v. Caine, 584 A.2d 615 (Me. 1990) 7

Cameron v. Pepin, 610 A.2d 279 (Me. 1992) 7

Coleman v. Thompson, 501 U.S. 722 (1991) 10

Davis v. Beason, 133 U.S. 333 (1890) 10

Doe v. Evans, 718 So. 2d 286 (Fla. Dist. Ct. App. 1998) 11

Gammon v. Osteopathic Hosp. of Me. Inc., 534 A.2d 1282 (Me. 1987) 7

Graffam v. Wray, 437 A.2d 627 (Me. 1981) 9

Lambrix v. Singletary, 520 U.S. 518 (1997) 10

Langford v. Roman Catholic Diocese of Brooklyn, 677 N.Y.S.2d 436 (Sup. Ct. 1998) 11

L.L.N. v. Clauder, 209 Wis. 2d 674, 563 N.W.2d 434 (1997) 12

Local 926, International Union of Operating Engineers v. Jones, 460 U.S. 669 (1983) 5

Cited Authorities

	Page
N.H. v. Presbyterian Church, 1999 WL 1013547 (Okla. 1999)	11
Reynolds v. United States, 98 U.S. 145 (1878)	10
Rowe v. Bennett, 514 A.2d 802 (Me. 1986)	7
Schmidt v. Bishop, 779 F. Supp. 321 (S.D.N.Y. 1991)	11
Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441 (Me. 1997)	8, 9

Statute:

28 U.S.C. § 1257(a)	4, 5, 6

United States Constitution:

First Amendment	6, 7, 10, 13

Rules:

Sup. Ct. R. Rule 10(b)	11
Sup. Ct. R. Rule 14(g)(i)	4
Sup. Ct. R. Rule 14(4)	4

Other Authority:

Art. I. § 3 of the Maine Constitution	9

The Respondents Watchtower Bible and Tract Society of New York, Inc., Patrick LaBreck, and Robert Wells, respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Maine Supreme Judicial Court's opinion in this case. That opinion is reported at 738 A.2d 839 (Me. 1999).

STATEMENT OF THE CASE

As a teenager, Petitioner Bryan R. was sexually abused by his next-door neighbor, Larry Baker. They both were members of the same religious congregation during the time period of the abuse. Petitioner Bryan R. brought suit against Mr. Baker, and included as defendants elders of his church: Robert Wells, Patrick LaBreck, and his stepfather.

Before abusing the Petitioner, Mr. Baker had molested a minor member of the congregation. As a result of that incident, Messrs. Wells, LaBreck, and Petitioner's stepfather, in their role as a congregational judicial body, removed Mr. Baker from the status of congregational "ministerial servant," issued private rebuke, and temporarily forbade him from having any contact with minor members of the congregation. They did not make a public announcement of Mr. Baker's actions to the congregation.

Mr. Baker was an ordinary member of the congregation when he molested Petitioner. There is no allegation that Mr. Baker was an agent or employee of the congregation. There is no claim that Mr. Baker occupied any clerical position as a priest, minister, or pastor. There is no allegation that the congregation elders affirmatively placed Mr. Baker in a position of control and supervision of children, or that they knowingly placed him in a position where he could sexually

abuse children in a church setting. There is no allegation that Mr. Baker molested the Petitioner during any church activity. There is no allegation that Mr. Baker was ever restored to his former status as a "ministerial servant." Petitioner alleged that upon becoming aware of Mr. Baker's prior wrongdoing, the elders should have excommunicated him. Petitioner asserts that because they did not excommunicate Mr. Baker and later allowed him to resume activities of an ordinary church member, the elders breached a duty owed to him. Petitioner also included as a defendant the congregation's national religious organization, the Watchtower Bible and Tract Society of New York, Inc., contending that it, too, breached a duty owed to him.

Petitioner's stepfather was dismissed from the action and judgment against Mr. Baker was entered by stipulation, leaving as sole defendants Mr. Wells, Mr. LaBreck, and the Watchtower Bible and Tract Society of New York, Inc. Petitioner's complaint against the remaining defendants contained three causes of action based only upon Maine common law: Count I Breach of Fiduciary Duty, Count II Intentional Infliction of Emotional Distress, and Count III Negligent Infliction of Emotional Distress. On August 18, 1998, Superior Court Justice Susan Calkins, Cumberland County, State of Maine, granted Respondents' motion to dismiss for failure to state a claim. (Pet. 18a-24a). On October 18, 1999, the Maine Supreme Judicial Court unanimously affirmed the dismissal. (Pet. 1a-17a).

REASONS FOR DENYING THE WRIT

I. The Decision Below Does Not Raise the Question Presented in the Petition.

The sole question presented in the petition is whether "the First Amendment precludes a civil court from holding a religious organization liable for its negligent or reckless or intentional failure to stop a known, adult, child molester member of the church from sexually abusing another child member of the religion." (Pet. i) The Maine Supreme Judicial Court did not expressly address that question in this proceeding. Rather, the court found that, under Maine common law, Respondents owed Petitioner no duty to protect him from other members of the church. For this reason, the petition should be dismissed.

After effectuating a settlement with the perpetrator, Mr. Baker, and dismissing all claims against his elder/ stepfather, Petitioner continued the case against the elders and national religious organization, attempting to establish liability by means of a variety of state common law theories. The Maine Supreme Judicial Court rejected these efforts to hold third parties liable for the wrongdoing committed by one parishioner upon another.

Contrary to Petitioner's broadly-stated "Question Presented," the lower court did not issue a sweeping ruling based on Constitutional law. Rather its decision to reject the imposition of a generalized fiduciary duty on the part of a church to protect members of its congregation from other members was based on state common law grounds:

> We decline to recognize a general common law duty on the part of an organization such as a church to protect its members from each other. Accordingly, we do not reach the constitutional issue. (Pet. 10a)

It was on this basis that the lower court dismissed the count based on breach of fiduciary duty. It was also from this foundation that the court's dismissal of the common law counts of intentional and negligent infliction of emotional distress flowed. Therefore, the court did not decide the question presented in the petition.[2]

II. This Court Lacks Jurisdiction to Review a State Court Decision Based on Independent and Adequate State Grounds of State Common Law or State Constitutional Law.

The petition for a writ of certiorari must be denied since this case is not within this Court's appellate jurisdiction. Title 28 U.S.C. § 1257(a) does not permit review of a state's highest court's final judgment when that judgment is predicated on state law. The judgment of the Maine Supreme Judicial Court was predicated upon state common law and the Maine Constitution. Therefore, this Court lacks jurisdiction to review the judgment and the petition must be denied.

---

2. Petitioner failed to adhere to Sup. Ct. R. Rule 14(g)(i) in not specifying the stage of the proceedings when and how the federal questions sought to be reviewed were raised, or how they were passed on by the lower courts. Sup. Ct. R. Rule 14(4) permits this Court to deny the petition for petitioner's failure to present with accuracy, brevity and clarity the information essential for a ready and adequate understanding of the points requiring consideration.

Petitioner's complaint posed no issue involving a state statute. "Because a common-law cause of action cannot be said to be a 'statute' for purposes of § 1257(2), this case is not within our § 1257(2) appellate jurisdiction." *Local 926, International Union of Operating Engineers v. Jones*, 460 U.S. 669, 675 n.7 (1983). Although commenting on 28 U.S.C. § 1257(a)'s predecessor, this Court's analysis that the common law is not the equivalent of a "statute" to convey jurisdiction underscores that Petitioner's common-law claims cannot serve as a predicate for this Court's jurisdiction. Therefore, this is not a matter "where the validity of . . . a statute of any State is drawn in question on the ground of its being repugnant to the Constitution." 28 U.S.C. § 1257(a).

The complaint against the elders and national religious organization put forth causes of action exclusively grounded in Maine common law — breach of fiduciary duty, negligent infliction of emotional distress, and intentional infliction of emotional distress. The Maine Supreme Judicial Court applied Maine law in declining to recognize a common law duty on the part of the Respondents to protect parishioners from each other. Thus, this Court lacks jurisdiction to review that decision.

A. Dismissal of breach of fiduciary duty count was based solely on Maine's common law.

In dismissing the breach of fiduciary duty count, Maine's Supreme Judicial Court explicitly based its decision on state common law:

> On the facts alleged in the complaint, we conclude that Bryan has failed to plead a fiduciary

> relationship with sufficient particularity, and we decline to recognize a general common law duty on the part of an organization such as a church to protect its members from each other. Accordingly, we do not reach the constitutional issue.

(Pet. 10a).

Since this count was dismissed solely upon state common law grounds and no constitutional issue was addressed by the court below, this Court lacks jurisdiction to review the decision in the fiduciary duty issue.

B. Dismissal of the negligent infliction of emotional distress count was based on independent and adequate state grounds of Maine's common law.

Petitioner does not claim that he was deprived of a Constitutional right by the lower court's decision. Rather, he contends that the lower court's interpretation of the First Amendment barred him from pursuing state court remedies. Assuming, arguendo, that such contention is both raised by the Maine Supreme Judicial Court's dismissal of the negligent and intentional infliction of emotional distress counts and falls within "any title, right, privilege, or immunity . . . specially set up or claimed under the Constitution," 28 U.S.C. § 1257(a), this Court nonetheless lacks jurisdiction, since the decision of the Maine Supreme Judicial Court rests on independent and adequate state grounds.

A Constitutional issue is not implicated in the lower court's dismissal of the negligent infliction of emotional distress count. Ecclesiastical matters were only mentioned in passing. Further, the lower court based its dismissal of

this portion of Petitioner's case upon alternate state grounds, refusing to apply a pure tort law foreseeability analysis, citing *Cameron v. Pepin*, 610 A.2d 279, 284 (Me. 1992); *Bolton v. Caine*, 584 A.2d 615, 618 (Me. 1990); *Gammon v. Osteopathic Hosp. of Me. Inc.*, 534 A.2d 1282, 1285 (Me. 1987); and *Rowe v. Bennett*, 514 A.2d 802, 806-07 (Me. 1986). The Maine court held: "We have never recognized a relationship between churches and their members of the type that would give rise to a duty to avoid psychic injury to those members." (Pet. 17a). The presence of these independent and adequate state grounds for dismissal deprives this Court of jurisdiction.

C. Dismissal of the intentional infliction of emotional distress count was based on the unique facts of this case as well as on independent and adequate state grounds of Maine's constitution.

In analyzing whether Petitioner established a cause of action for intentional infliction of emotional distress claim under Maine's common law, the court did touch on the First Amendment. However, its decision was predicated upon the unique facts of the case, as well as both the United States and Maine Constitutions:

> On these facts, however, we conclude that the effort to hold the church responsible, in addition to the wrongdoer himself, would require direct inquiry into the religious sanctions, discipline, and terms of redemption or forgiveness that were available within the church in the context of this claim, an inquiry that would require secular investigation of matters that are almost entirely ecclesiastical in nature.

> State courts may not interfere in matters concerning religious doctrine or organization.

(Pet. 15a-16a).

The Maine Supreme Judicial Court, on the unique facts of this case, correctly refused to extend liability to elders who, while removing a wrongdoer from his ministerial position, maintained the confidentiality of confessional communications. The court's refusal to permit second-guessing of a religiously based decision was not only based upon the unique facts of this case, but also on an independent and adequate state ground, namely the court's prior decision in *Swanson v. Roman Catholic Bishop of Portland,* 692 A.2d 441 (Me. 1997). In *Swanson,* the court noted:

> The First Amendment to the United States Constitution and Art. I. § 3[3] of the Maine

3. This section of the Maine Constitution states:

> All individuals have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no one shall be hurt, molested or restrained in that person's liberty or estate for worshipping God in the manner and season most agreeable to the dictates of that person's own conscience, nor for that person's religious professions or sentiments, provided that that person does not disturb the public peace, nor obstruct others in their religious worship; — and all persons demeaning themselves peaceably, as good members of the State, shall be equally under the protection of the laws, and no subordination nor preference of any one sect or denomination to another shall ever be established by

(Cont'd)

> Constitution both guarantee citizens the right to freely exercise their chosen religion and forbid the establishment of religion by the government. When interpreting these guarantees, courts have generally held that states are forbidden from interfering in matters concerning religious doctrine or organization.

The Maine Supreme Judicial Court's refusal to extend the common law tort of intentional infliction of emotional distress to encompass Petitioner's claim is a continuation of its long-standing reliance upon Maine's constitution. In *Swanson,* the court held that in cases with religious overtones, "courts have failed to maintain the appropriate degree of neutrality required by the United States and Maine Constitutions." *Id.* at 445. The *Swanson* court relied upon its decision in *Graffam v. Wray,* 437 A.2d 627 (Me. 1981), which held: "Cognizant though we are of the wall of separation between church and state, erected by our organic law, we recognize that there are certain circumstances where the courts may intervene in church schisms which affect church property." *Id.* at 629 (footnotes omitted). "Our organic law" is Art. I. § 3 of the Maine Constitution. *Id.* The Maine Constitution was, and is, the foundation of the court's decisions — from *Graffam* to *Swanson* to *Rees.* This "organic law," the Maine Constitution, is an independent and adequate state ground. Because the lower court decision was founded

---

(Cont'd)

> law, nor shall any religious test be required as a qualification for any office or trust, under this State; and all religious societies in this State, whether incorporate or unincorporate, shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance.

on such ground, this Court cannot exercise jurisdiction over the intentional infliction of emotional distress count.

Even though the Maine Supreme Judicial Court's decision alluded to the United States Constitution, this Court does not obtain jurisdiction. This Court has consistently held that there is no review of state court decisions resting on state law grounds that are independent of any federal question and adequate to support the judgment. *Lambrix v. Singletary,* 520 U.S. 518, 522-23 (1997); *Coleman v. Thompson,* 501 U.S. 722, 729 (1991). The petition should be dismissed.

III. There Is No Compelling Reason to Grant the Writ Since There Exists No Conflict of Decisions Among State Courts of Last Resort or a United States Court of Appeals.

Petitioner contends that there is a "split among state courts as well as among federal circuits" (Pet. i) with respect to the First Amendment's application to religious organizations and sexual abuse of children. This contention finds no support in his cited cases. No case cited by Petitioner involves the establishment of liability against a religious organization or minister for the sexual abuse performed by one member of the congregation against another member of the congregation.[4]

---

4. The weakness of Petitioner's argument is manifested by his reliance on *Davis v. Beason,* 133 U.S. 333 (1890), and *Reynolds v. United States,* 98 U.S. 145 (1878), to suggest that this Court has previously infringed on the interests of Jehovah's Witnesses. (Pet. 10-12). *Davis* and *Reynolds* involved members of the Church of Jesus Christ of Latter-Day Saints, known as the Mormon Church. Jehovah's Witnesses have never espoused a belief in polygamy.

The cases cited by Petitioner involve sexual abuse committed by a priest, a pastor, a nun, or a deacon. There is no such allegation in this case.[5] For that reason alone, Petitioner finds no support among his citations.

With respect to Petitioner's list of cases purportedly holding "that the First Amendment does bar tort liability" (Pet. ii), three cases[6] are not decisions of state courts of last resort or of a United States Court of Appeals. Therefore, they cannot serve as a predicate for this Court's granting review of this matter. Sup. Ct. R. Rule 10(b).

The remaining cases cited provide little support for Petitioner's claim of a split of authority. *N.H. v. Presbyterian Church*,[7] 1999 WL 1013547 (Okla. 1999) (unreported), specifically did not reach a Constitutional issue:

> Under the facts presented, we hold that the national organization is not liable for Brigden's tortious conduct. Because no basis exists to impose liability against the national organization, we decline . . . to determine whether the First

---

5. In fact, Maine's Supreme Judicial Court expressly did not address the liability of a church for the wrongdoing of its employee or agent in causing injury to a child. (Pet. 5a n.2).

6. *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991); *Langford v. Roman Catholic Diocese of Brooklyn*, 677 N.Y.S.2d 436 (Sup. Ct. 1998); *Doe v. Evans*, 718 So. 2d 286 (Fla. Dist. Ct. App. 1998).

7. The opinion contains the following notice: "This opinion has not been released for publication in the permanent law reports. Until released, it is subject to revision or withdrawal." *Id.* at 1.

> Amendment stands as a bar to all employment-related liability of an ecclesiastical organization for its ministerial officers.

Id. at 1.

> Although we do not reach the constitutional issue found dispositive by the trial court, the summary judgment ruling is affirmed. Our holding is based on Oklahoma law which provides bona fide, separate, adequate and independent grounds for our decision.

Id. at 6 (footnotes omitted).

Equally unavailing is *L.L.N. v. Clauder*, 209 Wis. 2d 674, 563 N.W.2d 434 (1997). Although the Supreme Court of Wisconsin did reach a holding on Constitutional grounds, it also reached the same result on independent and adequate state common law grounds:

> [E]ven if we assume that the First Amendment does not preclude L.L.N.'s claim, we conclude that the undisputed facts and all reasonable inferences drawn therefrom do not establish a genuine issue of material fact as to whether the Diocese knew or should have known about Clauder's alleged propensity to use his position as chaplain to sexually exploit patients whom he counseled. Thus, the Diocese is entitled to summary judgment as a matter of law on this basis as well.

Id. at 678, 563 N.W.2d at 437.

To the same effect is the remaining case cited by Petitioner, *Ayon v. Gourley*, 47 F. Supp. 2d 1246 (D. Colo. 1998), *aff'd*, 185 F.3d 873 (CA10 1999). The court in *Ayon* reached a constitutional issue, but reached the same result on independent and adequate alternate state common law grounds: "Consequently, summary judgment must be granted for Defendants on all Plaintiff's claims based on the statute of limitations." *Id.* at 1255.

There is not one decision of any other court that deals with the unique fact pattern presented in the court below. Thus, there is no conflict of decisions about the applicability of the First Amendment in determining the liability of a church for the wrongful action of one of its members against another member. There is no compelling reason to grant the petition for a writ of certiorari. The petition must be dismissed.

IV. Petitioner Has Abandoned His Case Against Mr. Wells and Mr. LaBreck.

Petitioner has abandoned his case against Mr. Wells and Mr. LaBreck. Petitioner's "Question Presented" only focuses on the liability of the corporate defendant: "Does the First Amendment preclude a civil court from holding a religious organization liable . . . ?" (Pet. I). Further, his "Statement of the Case" exclusively focuses on the liability of the organization: "The fundamental question is whether a religious organization may invoke the First Amendment. . . ." (Pet. 1).

Since Mr. Wells and Mr. LaBreck are not listed by Petitioner as parties before this Court, are not addressed once by name in Petitioner's discussion of "Reasons for Granting

the Writ," and are not identified in Petitioner's "Question Presented" or "Statement of the Case," the case against them has been abandoned. The decision of the Maine Supreme Judicial Court, as to Mr. Wells and Mr. LaBreck, should stand.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PAUL D. POLIDORO
Counsel of Record
LEGAL DEPARTMENT
WATCHTOWER BIBLE AND TRACT
SOCIETY OF NEW YORK, INC.
100 Watchtower Drive
Patterson, NY 12563
(914) 306-1000

BRUCE C. MALLONEE
Of Counsel
RUDMAN & WINCHELL, LLC
84 Harlow Street
P.O. Box 1401
Bangor, ME 04402-1401
(207) 947-4501

Attorneys for Respondents